In the Supreme Court of the United States

OCTOBER TERM 1965

No. 229

NATHANIEL E. BERRY,

Plaintiff-Appellant,

v.

STATE TAX COMMISSION,

Defendant-Appellee.

On Appeal from the Supreme Court of the State of Oregon

BRIEF IN OPPOSITION TO MOTION TO DISMISS

1. Questions Presented (Jur. St. 4-5).

The issue invoking the Supremacy Clause (Jur. St. 4-5) was clearly raised and argued in the lower courts and disposed of by the Oregon Tax Court. (See Jur. St. 8-10 for full references). It was manifest that alleged contravention of an act of Congress (the Oregon Admission Act) by a state statute (ORS 316.360) necessarily invokes the Supremacy Clause, even though not named as such.

2. Statement of Facts (Jur. St. 6-8).

Appellant has always contended, and it is stipulated, that he was and is the beneficiary of a trust of real property located in Oregon (R. 3; App. Br. 6; R. 5). Such fact constitutes him a proprietor of land within the meaning of the Oregon Admission Act and gives him standing to invoke the protection of the Act.

ARGUMENT

1. The Oregon Admission Act Applies in this case.

The Oregon Admission Act (B. 1-2), provided, among other things, that nonresident "proprietors" should never be "taxed" higher than residents by the State of Oregon. ORS 316.360 expressly denies all personal, nonbusiness deductions in the case of a nonresident taxpayer, and thus taxes him at a higher rate than resident taxpayers.

The Tax Court clearly erred in construing "proprietor" to mean only a businessman, and in holding that the Act does not protect personal income from land (1 O.T.C. Adv. Sh. 483, 488; A. 18). The word "proprietor" in 1859 and in the Act included an owner of land. See *Van Brocklin* v. *Tennesse*, 117 U.S. 151, 161, 167, 6 S. Ct. 670, 676, 29 L. Ed. 845, 848, 850 (1886), and *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 18 F. 753, 772, 785 (C.C. Cal., 1884), both involving comparable statehood acts. Appellee now concedes that the Act refers to proprietors of land (Mot. Dis. 12).

In its argument before the Oregon Supreme Court, appellee relied upon the Tax Court ruling that the word

"taxed" in the Act includes business income. Now, for the first time, appellee contends that "taxed" refers only to ad valorem taxes (Mot. Dis. 12). Its premise is that income taxes were nonexistent in 1859, the time of enactment of the Act.

Appellee's view of history is inaccurate. Charleston, South Carolina enacted an income tax prior to 1818. Act of Incorporation, 7 Stat. 98, § 4. See *Lining* v. *City Council,* 1 McCord 345, 349, 8 S.C.L.R. 217, 219 (1821); *Bulow* v. *City Council,* 1 Nott & McCord 527, 528, 530, 7 S.C.L.R. 318, 319, 320 (1818). There were others. See, e.g. *Mayor, & c. of Savannah* v. *Hartridge,* 8 Ga. 23 (1849); *City of New Orleans* v. *E. J. Hart & Co.,* 14 La. Ann. 803 (1859) (Act of March 19, 1856).

A number of cases have held that income taxes are included in state constitutional restrictions on the rate of taxation on "taxable property" and similar provisions. E. g., *Eliasberg Bros. Mercantile Co.* v. *Grimes,* 204 Ala. 492, 86 So. 56, 61 (1920), construing a provision of the 1875 constitution.

Taxes on income were mentioned in *Hylton* v. *United States,* 3 Dall. 171, 174, 180, 1 S. Ct. 150, 152, 158, 1 L. Ed. 556, 557, 560 (1796). A federal income tax was proposed but not adopted during the War of 1812. The first federal income tax was adopted by the Act of August 5, 1861, Sec. 49, 12 Stat. 292, 309.

Appellee concedes that, with respect to ad valorem taxes, at least, the State of Oregon cannot tax lands of nonresidents at a different rate than land of residents

(Mot. Dis. 12), by reason of the mandate of the Oregon Admission Act. Prohibitions on state taxing power were regularly included by Congress in statehood acts from the Act of March 1, 1817, 5 Stat. 348, 349 (Mississippi) to the Act of July 16, 1894, 28 Stat. 107, 108 (Utah). The apparent purpose is quite like the purpose of the Privileges and Immunities Clause, to provide a broad policy of equal treatment for nonresidents. Cf. discussion in *Van Brocklin* v. *Tennessee, supra,* 117 U.S. at 165-66, of broader construction of prohibitions in statehood acts.

With this policy in mind, it isn't the kind of tax that matters but the unreasonableness of the discrimination. As to the distinction between income and property taxes, one state court said:

> "The reason for protection in the one case is as compelling as it is in the other. The lack of protection in the one case leads to the same consequences that it leads to in the other. We think that the policy and the purpose of the Constitution, in harmony with its terms, equally embraces both." *Eliasberg Bros. Mercantile Co.* v. *Grimes,* 204 Ala. 492, 86 So. 56, 61 (1920) (Ala. Const.)

License fees, ad valorem taxes, income taxes, estate taxes, sales taxes and other taxes have all run afoul of the Privileges and Immunities Clause. (See annotation, notes 131-157, to U.S.C.A., Const. Art. IV, Sec. 2, cl. 1).

If the scope of the statehood acts is limited to ad valorem taxes, total evasion of the statutory policy is possible. The construction of those federal statutes requires the consideration of this Court to prevent erosion by state enactments.

2. A nonresident taxpayer is entitled to the same deductions as a resident taxpayer.

In the court below, appellant relied on the case of *Sprague* v. *Fletcher,* 69 Vt. 69, 75, 37 Atl. 239, 241 (1896). (App. Br. 17-20; R. 5). In that case a nonresident claimed to be a resident in order to get the same tax deductions allowed to residents. The Vermont court held that by reason of the Privileges and Immunities Clause, the nonresident was entitled to be taxed in the same manner as a resident.

This Court apparently adopted the same view in *Reserve Life Insurance Co.* v. *Bowers,* 380 U.S. 258, 13 L. Ed. 2d 959, 85 S. Ct. 951 (1965), which reversed and remanded, per curiam, an Ohio case on the basis of *Wheeling Steel Corp.* v. *Glanders,* 337 U.S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544 (1949).

In the *Reserve Life* case, *supra,* a Texas insurance company doing business in Ohio sought to be listed as a domestic insurance company for tax purposes, because foreign insurers were taxed under a different statute than that which taxed domestic insurers. The Ohio court held that the taxpayer could not claim the exemption granted the domestic insurance companies. *Reserve Life Insurance Company* v. *Bowers,* 119 Ohio App. 251, 257, 258, 196 N.E.2d 114, 118 (1963). The Ohio Supreme Court had affirmed without comment. 175 Ohio St. 468, 196 N.E.2d 87 (1964). This Court's action would seem to affirm the holding in *Sprague* v. *Fletcher, supra.*

3. The State must allow nonresident taxpayers to deduct a proportionate part of the personal deductions allowed to resident taxpayers.

The lower courts and appellee have not previously suggested any reasonable ground for the discrimination other than the fact of nonresidence. In fact, the appellee State Tax Commission previously admitted that this same discrimination "seems patently unrational as well as unfair, * * *." (A. 27). Two justices of the court below agreed that the discrimination was unconstitutional. (A. 8). Now appellee urges:

> "The state exercises dominion over its own citizens and is concerned with their medical expenses, casualty losses, expenses, etc. The expenditures of nonresidents are more likely to be in proportion to income not taxable by the state and are not situated so as to be readily accessible to audit." (Mot. Dis. 6).

If the argument is sound, a state would be justified in denying the personal exemption or the standard deduction to nonresidents on the same ground, since they have the same social purposes. This Court expressly rejected the contention in *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920).

Appellee contends that there is a distinction for tax purposes between a flat exemption and an itemized deduction (Mot. Dis. 10-11). Some of the authorities relied on by appellee disagree: Culp, Selected Problems in Multistate Taxation, 44 Iowa L. Rev. 280, 292-93 (1959); Brief of Conference of Mayors, p. 28, and Appellant's Brief, p. 44, in Vol. 99, #548, Record in

Travis case, *supra*. Both devices are intended to cover personal expenses, not business expenses.

Appellee asserts that personal expenses of nonresidents are likely to be in proportion to income not taxed by the state. If the premise is true, the state should apportion personal deductions as well as business deductions and income, and allow a nonresident taxpayer to deduct from his Oregon taxable income that proportion of his personal, nonbusiness deductions allowed to residents as his Oregon taxable income bears to the taxable income from all states. That is the method adopted by Georgia. Ga. Code Ann. Sec. 92-3112(d)(1935). Oklahoma allows apportioned deduction of medical expenses by nonresidents. 68 Okl. Stat. Ann. Sec. 880(j).

Appellant consistently urged a policy of apportionment before the lower courts (App. Br. 5, 7, 10-13; R. 5; A. 5). Professor Culp seems to agree that apportionment is the sound and reasonable approach. 44 Iowa L. Rev. at 292-93. ORS 316.360 is broad enough to allow such a construction. In other words, apportionment establishes the necessary connection with income, within the terms of the statute. The State clearly can require such apportionment. See *McCutchan* v. *Oklahoma Tax Comm.*, 191 Okla. 578, 132 P.2d 337 (1942). Cf. *Shaffer* v. *Carter*, 252 U.S. 37, 57, 40 S. Ct. 221, 227, 64 L. Ed. 445, 458-59 (1920).

The reasoning of the *Shaffer* case with respect to deduction of business losses would apply with equal force to personal, nonbusiness deductions. If a state taxes part of a nonresident's personal income, it must

allow him a proportionate amount of the personal, nonbusiness deductions allowed to resident taxpayers.

Appellee suggests the possibiilty that a nonresident may take the same deductions twice in different states. The same possibility exists with personal exemptions, but the Court required nondiscrimination nevertheless. *Travis* v. *Yale & Towne Mfg. Co., supra,* 252 U.S. at 81-82, 40 S. Ct. at 232-33, 64 L. Ed. at 470.

Appellee also gives a strange example of how a nonresident could avoid any Oregon tax by the daring expedient of borrowing money at 6% interest and investing it at the same rate (Mot. Dis. 9-10). On the facts stated, the nonresident would not have any real income anywhere to be taxed; the transaction is an economic wash.

The tax-avoiding nonresident taxpayer feared by the State of Oregon would be properly taxed if the State would simply require apportionment of personal deductions.

CONCLUSION

The statutory discrimination against nonresidents here involved is admittedly unrational and unfair, and it is a general discrimination against a large class of persons. There is a need for an announced requirement of apportionment of personal deductions.

Appellee's construction of the Oregon Admission Act is unsound and in conflict with the construction given the Act by the Oregon Tax Court. The need for this

Court's construction of the various statehood acts is apparent.

This Court should fully examine the constitutional questions on the merits with briefs and oral argument.

Respectfully submitted,

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